



REPUBLIC OF KENYA



**Papa v Nyabola & another (Civil Application E127 of 2023)  
[2024] KECA 214 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KECA 214 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E127 OF 2023  
JM NGUGI, JA  
FEBRUARY 29, 2024**

**BETWEEN**

**ROBERT OPAAT PAPA ..... APPLICANT**

**AND**

**BASIL OKOIT NYABOLA ..... 1<sup>ST</sup> RESPONDENT**

**RECILA NAAKHUMITSA OMUCHERE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Application for Extension of time to the 2nd Respondent/ Applicant within which to file Notice of Appeal against the Judgment and Decree of the Environment and Land Court at Busia, (Omollo, J.) dated 25th May, 2023 in ELC Case No. 01 of 2019)*

**RULING**

1. The applicant herein was the 2<sup>nd</sup> respondent at the Environment and Land Court in Busia ELC Case No. 1 of 2019. The suit was an Originating Summons brought by the 1<sup>st</sup> respondent in the present application. The Summons sought orders of adverse possession against the applicant and his predecessor in title to the parcel of land known as LR NO. South Teso/Amukura/1366 (suit property).
2. In a judgment dated 25<sup>th</sup> May, 2023, the ELC ruled in favour of the 1<sup>st</sup> respondent herein, Basil Okoit Nyabola, finding that he had been in possession for more than twelve years.
3. The applicant is before this Court presently seeking for orders of extension of time to lodge an appeal against the judgment of the ELC.
4. The application is dated 12<sup>th</sup> October, 2023. It is supported by the affidavit of the applicant, Robert Opaat Papa, deponed on even date. Both on the face of the application and in his supporting affidavit, the applicant proffers two reasons for failure to timeously file a Notice of Appeal. First, he says that the judgment was delivered “by email” and that he was unaware of its delivery until much later. Second, the applicant says that he was unwell. He has attached a medical report dated 25<sup>th</sup> June, 2023 from St.



James Infirmary Hospital, Busia to substantiate this claim. The report which is addressed “to whom it may concern” says that the applicant suffers from diabetes, hypertension and chronic kidney disease. Consequentially, the letter makes clear that the applicant is being managed as an outpatient. There is no indication or claim that he was ever admitted at the hospital or any other hospital.

5. The application is opposed by the 1<sup>st</sup> respondent. He has filed a replying affidavit deponed on 14<sup>th</sup> February, 2024. In it, the 1<sup>st</sup> respondent makes three points:
  - a. First, he denies that the applicant did not know about the judgment. Instead, he positively avers that the applicant’s lawyer was present in court when the judgment was delivered.
  - b. Second, the 1<sup>st</sup> respondent claims that the judgment was fully executed immediately after it was delivered; and that the applicant has already paid for the costs he was condemned to pay. This, the respondent says, belies the applicant’s claim that he did not know about the judgment until he brought the present application.
  - c. Third, the 1<sup>st</sup> respondent says that it would be a waste of judicial time allowing the application anyway, since the applicant has no arguable appeal: the applicant should, instead, seek a refund of the monies he paid for the ill-fated purchase of the suit property.
6. The 1<sup>st</sup> respondent filed written submissions reiterating these three points. He also cited [Charles N. Ngugi v ASL Credit Limited](#) [2021] eKLR and [Mombasa County Government v Kenya Ferry Services & Anor](#) [2019] eKLR in support of his case for dismissal of the application. The 2<sup>nd</sup> respondent neither responded to the application nor filed written submissions.
7. The applicants did not file any submissions despite being served with the directions on hearing.
8. I have considered the application, the affidavit in support thereto and its annexures – including the judgment of the ELC, the replying affidavit filed on behalf of the 1<sup>st</sup> respondent; and the written submissions by the 1<sup>st</sup> respondent. The only question for determination is whether the applicant has met the threshold for the exercise of the Court’s discretion to grant leave for him to file an appeal out of time.
9. This Court is empowered to grant extension of time under Rule 4 of the [Court of Appeal Rules](#) which provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
10. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”



11. In the present case, the impugned judgment was delivered on 25<sup>th</sup> May, 2023. The present application was not filed until 12<sup>th</sup> October, 2023. That was 140 days from the date of delivery of the judgment or 4 months and 20 days. The Notice of Appeal is statutorily required to be filed within 30 days of delivery of the judgment. Therefore, the first action taken by the applicant to perfect his appeal came at least 110 days late.
12. The question for resolution is whether the delay is excusable, and if not, whether it is inordinate. The ostensible reason given by the applicant for the delay is twofold: first, that he was not aware of the date the judgment was delivered; and second, that he was sick.
13. I have interrogated both ostensible reasons for the delay in perfecting the applicant's right of appeal and I have found both to be unsatisfactory. First, the 1<sup>st</sup> respondent has deponed, quite credibly, in his replying affidavit, that the applicant's lawyer was aware of the delivery of the judgment. The applicant has not responded to that claim which was given on oath. Second, corroboration that the applicant's lawyer was aware of the judgment is provided by the judgment itself: on its face, it says that a copy of it was sent by email to the respective parties' advocates. Third, I noted that the applicant did not say when he, in fact, became aware of the judgment. He preferred to leave it vague and undisclosed. Suffice it to say that I am not persuaded that the applicant or his lawyer were not aware about the judgment.
14. How about the fact of his illness? The applicant does not explain how his illnesses – which are chronic – prevented him from filing an appeal. He simply claims that he was “very sick”. Sickness of a party, without more, does not entitle a party to extension of time absent a showing that the sickness prevented the party from perfecting his right of appeal. In the present case, the medical report, which is curiously dated 25<sup>th</sup> June, 2023, merely demonstrates that the applicant suffers from diabetes, hypertension and chronic kidney disease. He is seen as an outpatient by the doctor. This does not, at all, offer any excusable reason for his failure to file a Notice of appeal timeously let alone explain the very long delay of 110 days. Perhaps if the applicant showed that he was institutionalized or offered some other rational connection between his illness and the delay, he would have fared better.
15. In these circumstances, the Court is not inclined to exercise its discretion on behalf of the applicant. The applicant's delay in perfecting his right of appeal is both inexcusable and inordinate in the circumstances; and the ostensible reasons given for the delay are disingenuous. Consequently, the Court is unable to exercise its discretion on his behalf.
16. The result is that the Application dated 12<sup>th</sup> October, 2023 is for dismissing, and I hereby do so. Costs are awarded to the respondent.
17. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

